UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PIZZA THE PIE, LLC AND BECCA BOO PIES, LLC, A SINGLE EMPLOYER

and **Case 10–CA–179060**

HENRY THOMAS PHILLIPS, III, an Individual

Joseph W. Webb Esq.,
for the General Counsel.
Reyburn W. Lominack, III, Esq. (Fisher & Phillips, LLP),
of Columbia, South Carolina, for the Respondent.
Mark Potashnick, Esq. (Weinhaus & Potashnick)
of St. Louis, Missouri, for the Charging Party.

DECISION

ELIZABETH M. TAFE, Administrative Law Judge. This case involves an employer's maintenance and enforcement of an arbitration policy that requires employees as a condition of employment to agree to pursue legal disputes with the employer in binding arbitration on an individual basis only, thereby requiring employees to waive their rights to pursue class and collective legal actions against their employer in all forums. The arbitration agreement is also alleged to interfere with employees' rights to file charges with the National Labor Relations Board (the Board). As discussed in more detail below, based on extant Board precedent, I find that that Pizza the Pie, LLC and Becca Boo Pies, LLC, a single employer, violated the National Labor Relations Act (the Act) as alleged.

STATEMENT OF THE CASE

This case is before me on a stipulated record. The Charging Party, Henry Thomas Phillips, III, filed an unfair labor practice charge, an amended charge, and a second amended charge on June 27, 2016, September 16, 2016, and December 5, 2016, respectively.[1] The General Counsel issued the amended complaint on December 19.[2] The amended complaint alleges that

[1] All dates a referred to herein relate to the year 2016 unless otherwise indicated.

[2] The General Counsel issued an Erratum to the amended complaint on December 2, which attaches the relevant arbitration agreement. Although this copy agreement is not signed by the Respondent, there is no dispute on this record that it a true representation of an effective agreement.

the Respondents violated Section 8(a)(1) of the Act[3] by (1) maintaining a mandatory arbitration policy that prohibits employees from pursuing multiplaintiff, class, or collective claims about terms and conditions of employment in any forum, arbitral or judicial; (2) maintaining a mandatory arbitration policy that interferes with employees' access to the Board's processes; and (3) enforcing provisions of the mandatory arbitration policy to compel arbitration on an individual basis and to preclude adjudication of collective claims in any forum.

On December 20, Pizza the Pie, LLC and Becca Boo Pies, LLC together filed a timely answer to the amended complaint.

On January 12, 2017, the parties submitted a Joint Motion and Stipulation of Facts, requesting that I decide the foregoing allegations based on a stipulated record, and therefore waiving their rights to examine and cross-examine witnesses. I granted the motion and, on February 7, 2017, the parties submitted their respective posthearing briefs.

On the entire record[4] and after considering the parties' briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Pizza the Pie, LLC and Becca Boo Pies, LLC are limited liability companies (the Companies) with offices and places of business in Georgia. The Companies manage and operate public restaurants selling food and beverages in Georgia. From its office in Georgia, Pizza the Pie, LLC also manages and operates public restaurants in the state of South Carolina.

The parties stipulate and I find that the Companies are a single employer within the meaning of the Act (the Respondent).[5]

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[3] 29 U.S.C. §§ 158(a)(1), et seq.

[4] I received the Joint Motion and Stipulation of Facts with its attachments as Joint Exhibit 1. The Motion lists stipulated facts identified as (a) to (bb) and attaches exhibits identified as 1(a) to 1(o) and 2 to 12. I refer to particular stipulated facts as "Jt. Fact" and to the motion's attachments as "Jt. Exh."

[5] The Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise. *Radio Union v. Broadcast Service of Mobile*, 380 U.S. 255 (1965). The Board focuses on four factors in determining whether entities constitute a single employer: (1) common ownership or financial control; (2) interrelation of operations; (3) common control of labor relations; and (4) common management. *Bolivar-Tees, Inc.*, 349 NRB 720 (2007); see also *Rogan Brothers Sanitation*, 362 NLRB No. 61 (2015), and cases cited therein. All four factors need not be present. *Bolivar-Tees*, above; *Rogan Brothers*, above. Here, the parties have stipulated that the Companies are a single employer. Although the record is limited, I find there is sufficient evidence in the record to support this stipulation. This evidence includes: one individual owns both Companies; the Charging Party worked at various sites that included sites of both Companies; the Companies admit that the arbitration agreement setting forth certain terms and conditions of employment applies to employees at both Companies and is enforceable by both Companies as written; the Companies have responded to and proceeded in this case by filing answers together and by being represented by the same legal counsel; and, other than the Companies' corporate names and their assertions that they are separate companies, there is an absence of evidence on this record that they function independently. Although the Companies denied

In conducting its business operations, annually, the Respondent has derived gross annual revenue in excess of $500,000, and has purchased and received goods and materials valued in excess of $5000 directly from points located outside of the State of Georgia.[6]

The parties stipulate, the Respondent admits, and I find, that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Parties

The Respondent owns and operates multiple Domino's Pizza franchise restaurant/stores in two states (Jt. Exh. 4). One individual, Greg Fox, owns both Pizza the Pie, LLC and Becca Boo Pies, LLC (R Br. at 2, fn. 1), which I have found above to be a single employer. The Respondent employs delivery drivers whose job duties include delivering pizza and other food items to customers' homes and workplaces (Jt. Exh. 4).

Phillips, the Charging Party, was employed by the Respondent as a delivery driver, working at various locations, including Pizza the Pie and Becca Boo Pies locations from about January 2008 to January 2015 (Jt. Fact (n); see also R Br. at 2, fn. 1). On May 28, 2010, while employed by the Respondent, Phillips signed the Mutual Agreement to Arbitrate (the Arbitration Agreement) described below (Jt. Fact (r), Jt. Exh. 2). As discussed in more detail below, in April 2016, Phillips commenced a Fair Labor Standards Act (FLSA) claim in Federal District Court on behalf of himself and similarly situated persons alleging, inter alia, that the Respondent's reimbursement practices for its delivery drivers violates FLSA's minimum wage requirements (Jt. Fact (s), Jt. Exh. 2).

B. The Arbitration Agreement

The parties stipulate and I find that, at all material times through the present, the Respondent required applicants and current employees to sign a document entitled "Mutual Agreement to Arbitrate," as a condition of employment, which states, in relevant part:

> 2. Claims Covered by This Agreement
>
> a. Covered Claims: Claims and disputes covered by this Agreement include all claims by Employee against Pizza the Pie, LLC d/b/a Domino's Pizza (as defined below) and all claims that Pizza the Pie, LLC d/b/a Domino's Pizza, may have against Employee,

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that they are "a single-integrated business enterprise" in their answer to the amended complaint (Jt. Exh.1(l)), I find that this denial is inconsistent with their clear admission in the same answer and in the stipulation (Jt. Fact (k)) that they are a single employer under the Act and it is not supported by the weight of the evidence on this record. Moreover, the Respondent did not raise any question about its status as a single-integrated enterprise in its brief to me. Thus, based on the entire stipulated record, including the Companies' stipulation to single-employer status, I find that the Companies are a single-integrated business enterprise and a single employer as alleged in the amended complaint.

[6] See Jt. Exh. 1(i) at 2–3 and Jt. Exh. 1(j) at 2.

including, without limitation, any claims Employee may have relating to his/her hiring, terms and conditions of employment, job assignments, payment of any wages, benefits or other forms of compensation, and/or separation from employment, such as any claims involving:

(1) Any federal, state, or local laws, regulations, or statutes prohibiting employment discrimination (such as, without limitation, race, sex, national origin, age, disability, religion), retaliation, and harassment, including but not limited to claims arising under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), the Equal Pay Act ("EPA"), the Civil Rights Acts of 1866 and 1871, 42 U.S.C. § 1981, the Family and Medical Leave Act ("FMLA"), Pregnancy Discrimination Act ("PDA") and any state law equivalents.

(2) Any alleged or actual contract, agreement, or covenant (oral, written or implied) between Employee and Pizza the Pie, LLC d/b/a Domino's Pizza (sic)

(3) Any Pizza the Pie, LLC d/b/a Domino's Pizza policy, or compensation practice, or benefit plans, including wage payment claims arising under the Fair Labor Standards Act ("FLSA"), or any state wage payment laws, claims arising under the Employee Retirement Income Security Act ("ERISA"), or any claims relating to a demand for reimbursement of or compensation for expenses allegedly incurred by Employee relating in any way to his or her employment with Pizza the Pie, LLC d/b/a Domino's Pizza (sic)

(4) Any public policy

(5) Any other claim for personal, emotional, physical, psychological, or other economic injury, including but not limited to any claims for negligence or tortious harm. For all covered claims, Employee and Pizza the Pie, LLC d/b/a Domino's Pizza expressly waive any right to a trial by jury. No covered claims may be asserted as part of a multiplaintiff, class or collective action. Moreover, no covered claims may proceed to arbitration on a multi-plaintiff, class or collective basis. Rather, each allegedly aggrieved employee must proceed to arbitration separately and individually, and the Employee's arbitration proceeding shall encompass only the covered claims purportedly possessed by such individual Employee.

b. Claims Not Covered: The only disputes between Employee and Pizza the Pie, LLC d/b/a Domino's Pizza which are not included within this Agreement are:

(1) Any claim by Employee for workers' compensation or unemployment compensation benefits.

(2) Any claim by Employee for benefits under a company plan which provides its own arbitration procedure.

(3) Any claim by Pizza the Pie, LLC d/b/a Domino's Pizza for injunctive relief for Employee's violation of contract, common law, statutes related to trade secrets or confidential information, covenants not to compete or other restrictive covenants.

The parties stipulate that employees are bound to the Arbitration Agreement's terms as a condition of their employment (Jt. Fact (q); Jt. Exh. 4) and that both Companies of the Respondent may enforce the Agreement.[7] Claims under the NLRA or charges before the Board are not identified explicitly as either included in or excluded from the Arbitration Agreement.

C. Phillips' FLSA Claims and Respondent's Responses

On April 21, 2016, Phillips filed a lawsuit against the Respondent in the United States District Court for the Northern District of Georgia, Gainesville Division, on behalf of himself and other similarly situated individuals, alleging violations of FLSA (Jt. Exh. 3). On June 24, 2016, the Respondent filed an answer and counterclaim asserting that Phillips' claims were subject to arbitration on an individual basis and that Phillips was precluded from pursuing any claims in arbitration on a class or collective basis (Jt. Exh. 4). On June 27, 2016, Phillips filed a demand for arbitration with the American Arbitration Association (AAA) seeking to pursue his FLSA claims on a collective basis in that forum (Jt. Exh. 5).

The parties filed various motions, pleadings, and/or responses to each other's motions in the District Court action that related to the Respondent's attempts to enforce the terms of the Arbitration Agreement that would restrict the forum and form of Phillips' claims to individual arbitration.[8]

On August 18, 2016, Respondent filed an answer with the AAA asserting that Phillips' claims were subject to arbitration on an individual basis pursuant to the Arbitration Agreement, to which employees are bound as a condition of their employment with the Respondent (Jt. Exh. 12).

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[7] Of course, whether certain terms of the Arbitration Agreement are lawful and/or enforceable remains an ultimate issue in this case.

[8] As stipulated by the parties at Jt. Facts (v) to (aa): on July 12, 2016, Phillips filed a motion to dismiss Respondent's counterclaim (Jt. Exh. 6); on July 15, 2016, Respondent filed a Motion for Summary Judgment arguing that the court should enforce the class and collective action waiver provisions of the arbitration agreement in effect between Respondent and Phillips (Jt. Exh. 7); on July 26, 2016, Respondent filed a response to Phillips' motion to dismiss Respondent's counterclaim (Jt. Exh. 8); on August 1, 2016, Phillips filed an opposition to Respondent's Motion for Summary Judgment on its counterclaim (Jt. Exh. 9); on August 8, 2016, Phillips filed a reply in support of his motion to dismiss Respondent's counterclaim (Jt. Exh. 10); on August 12, 2016, Respondent filed a reply in support of its Motion for Summary Judgment (Jt. Exh.11).

There is an absence of evidence in this stipulated record to establish that any other employees joined the FLSA claims filed by Phillips in either forum, or that Phillips filed the claim at the request or direction of other employees or after consulting with other employees.

There are no determinations, orders, or decisions by either the District Court or the AAA in the stipulated record before me.

ANALYSIS

A. The 8(a)(1) *Allegations Regarding Maintenance of the Arbitration Agreement*

1. Interference with the pursuit of class or collective actions

The primary legal question in this case is whether the Respondent's Arbitration Agreement violates Section 8(a)(1) of the Act. The Board's holding in *Murphy Oil USA, Inc.* squarely addresses this question. 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), cert. granted, _ S.Ct. _, 2017 WL 125666 (mem)(January 13, 2017).[9]

In *Murphy Oil*, the Board reaffirmed its rationale and decision in *D. R. Horton, Inc*., 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), to find that an employer violates Section 8(a)(1) by imposing as a condition of employment a mandatory arbitration agreement that "precludes employees from filing joint, class or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." *D. R. Horton*, above at 1, cited in *Murphy Oil*, above slip op at 1. In *Murphy Oil*, the Board further found that an employer violates Section 8(a)(1) by the maintenance of an arbitration agreement that precludes employees from pursuit of class or collective claims in any forum, and by its attempts to enforce the unlawful provision. Although the Board's rulings on the issues set forth in *Murphy Oil* and *D. R. Horton* have received mixed reception in the Federal courts of appeals, as an administrative law judge I am bound to apply established Board precedent that has not been modified or reversed by the U.S. Supreme Court. *Pathmark Stores, Inc*., 342 NLRB 378 fn. 1 (2004); *Waco, Inc.,* 273 NLRB 746, 749 fn. 14 (1984). The Court has granted certiorari in *Murphy Oil*, but has not yet ruled. I therefore apply the Board's rationale from *Murphy Oil* and *D. R. Horton* to the present case.

Similar to the agreement in *Murphy Oil*, the Arbitration Agreement in this case requires employees to waive their rights to pursue class and collective claims in all forums. The Arbitration Agreement expressly states, "[n]o covered claims may proceed to arbitration on a multi-plaintiff, class or collective basis." It further states that employees "must proceed to arbitration separately and individually" on "covered claims purportedly possessed by the individual [e]mployee." "Covered claims" is defined broadly as all claims, with limited exceptions not relevant here, between the Respondent and an employee relating to, for example,

[9] On January 13, 2017, the Supreme Court granted certiorari in *NLRB v. Murphy Oil USA, Inc.*, *Epic Systems Corp. v. Lewis*, 823 F.3d 1147 (7th Cir. 2016), cert. granted 2017 WL 125664 (Jan. 13, 2017) and *Ernst & Young, et al. v. Morris*, 834 F.3d 975 (9th Cir. 2016), cert. granted 2017 WL 125665 (Jan. 13, 2017), which present the issue of whether arbitration agreements that bar employees from pursuing work-related claims on a collective or class basis in any forum violate Sec. 8(a)(1) of the Act.

hiring, terms and conditions of employment, compensation, and separation, including, among other claims, any employment discrimination claims under Federal, State, or local laws, contract claims, and FLSA claims. The Board has clearly ruled that the Section 7 right to concertedly act for mutual aid and protection is a core, substantive right, which encompasses the resort by employees to filing legal actions when they seek to improve their working conditions. *Murphy Oil*, slip op at 2, 6–7, and cases cited therein; see *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978). The Arbitration Agreement clearly and expressly bars employees from exercising their Section 7 right to pursue collective employment-related claims in all forums.

In its defense, the Respondent argues that *Murphy Oil* was wrongly decided. First, the Respondent asserts, correctly, that the Fifth Circuit has rejected the Board's position in both *Murphy Oil* and *D. R. Horton*. Second, the Respondent argues that the Board's theory of violation impermissibly conflicts with the Federal Arbitration Act (FAA) and related Supreme Court precedent. In short, the Respondent argues that, according to the FAA, arbitration agreements are to be enforced according to their terms, absent an exception, and that no exception to the FAA justifies the invalidation of the Respondent's Arbitration Agreement under the NLRA. The Respondent refers to Supreme Court precedent in interpreting the FAA in support of this argument. The Respondent further argues that the Rules Enabling Act (REA) proscribes the Board's assertion that the right to pursue class or collective claims is a substantive, rather than procedural right, in support of its argument that the policies of the FAA override the NLRA.

In *Murphy Oil*, the Board explained its reasons for disagreeing with the court of appeals' rejection of its rationale in *D. R. Horton*. With due respect to the Fifth Circuit, it is my role to apply extant Board law until or unless I am told otherwise by the Supreme Court. With respect to the arguments that the Board's holdings conflict with the FAA, that the NLRA must yield to the FAA in this context, and that the effect of the REA may nullify the Board's theory, I have considered them as articulated by the Respondent in this case; however, these arguments have been fully considered and consistently rejected by the Board in *Murphy Oil*, *D. R. Horton,* and subsequent cases applying their holdings. This present case presents no fact pattern or legal precedent that would materially affect the Board's legal analysis of these arguments. Therefore, I find that these arguments are unavailing.

The Respondent also argues that the case should fail because Phillips' filing of the FLSA claim was not concerted, as no other employees have joined Phillips in the FLSA claims on this record. In *Murphy Oil* and *D. R. Horton* the underlying court claims were filed by more than one lead plaintiff. The Respondent's argument fails for two reasons. First, the 8(a)(1) allegations in the amended complaint do not require a showing that an employee has engaged in concerted, protected activity—the showing required is that the arbitration policy had an objective tendency to interfere with, restrain, or coerce the exercise of Section 7 rights because a reasonable employee would construe it that way.[10] Second, even were it necessary to establish

[10] The holdings in *Murphy Oil* and *D. R. Horton* rely on longstanding Board precedent establishing that one way work rules may violate Sec. 8(a)(1) is if a reasonable employee would construe them to interfere with, restrain or coerce their rights under the Act. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527(D.C. Cir. 2007); *Cellular Sales of Missouri*, 362 NLRB No. 27, slip op at 1 fn. 4 (2015).

that Phillips engaged in concerted activity in this case, the Board has ruled that when an employee files a FLSA claim on behalf of himself and other similarly situated persons, he seeks to initiate or induce group action among employees and therefore, engages in concerted, protected activity within the meaning of Section 7. *Beyoglu*, 362 NLRB No. 152 (2015).[11] See *Meyers Industries*, 281 NLRB 882 (1985)(*Meyers II*), affd. sub nom *Prill v. NLRB,* 835 F.2d 1481 (D.C. Cir. 1987) cert. denied 487 U.S. 1205 (1988).

The Respondent alleges as an affirmative defense that the complaint allegations are time-barred pursuant to Section 10(b) of the Act, because Phillips signed the Arbitration Agreement more than 6 months before the charge was filed. This argument lacks merit. It is undisputed that the Respondent maintained and enforced its mandatory arbitration policy as described in the Arbitration Agreement within the 10(b) period. That Phillips signed the Arbitration Agreement in 2010 is immaterial. The Board will find that the maintenance and enforcement of an unlawful work rule or policy violates the Act, even if it was promulgated outside the 10(b) period. See, e.g., *PJ Cheese Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 and fn. 6 (2015); *Cellular Sales*, above, slip op. at 2 and fn. 7; see also *ADECCO, Inc.,* 364 NLRB No. 9 (2016) (The Board found the maintenance and enforcement of an arbitration agreement unlawful, while also finding that the promulgation of the agreement was not unlawful, because it was promulgated well outside 10(b) period.)

2. Interference with access to the Board

Work rules violate the Act if a reasonable employee would construe them to restrict or prohibit an employees' right to file charges with the Board or to access the Board's processes. *U-Haul*, above. The Board applies this well-established doctrine to find that employment arbitration policies are unlawful if a reasonable employee would construe them similarly to limit his/her right to file charges or to access the Board's processes. Id.; see also *Cellular Sales*, above; *Murphy Oil*, above, enfd. in relevant part and *D. R. Horton*, above, enfd. in relevant part. I find that the Respondent's requirement that employees agree to the Arbitration Agreement independently violates Section 8(a)(1) as alleged. There is no dispute that the policy set forth in the Arbitration Agreement is a mandatory condition of employment. (Jt. Fact (o) and (q)). It requires that all employment disputes under State, Federal and local laws be subjected to mandatory arbitration, with only limited exceptions, such as workers compensation and unemployment claims. It also lists various federal employment statutes as examples of statutes included in the policy. Neither the exceptions nor inclusions names the NLRA or the Board, and neither contains language that would clarify that the filing of Board charges or participation in Board processes would *not* be subject to the mandatory arbitration under the Arbitration Agreement. I find that a reasonable employee would construe the Respondent's broadly stated policy to limit his/her ability to file charges or to access the Board's processes, because the language of the Arbitration Agreement clearly applies its terms generally and comprehensively to "all claims . . . without limitations . . .", and expressly exempts "only disputes" listed, none of which involve the NLRA or the Board.

[11] In *Beyoglu*, the General Counsel alleged that the Respondent discharged an employee because of his concerted, protected activity, necessitating a showing that the employee had, indeed, engaged in Sec. 7 activity. There is no similar allegation here.

The Respondent's suggestion that the Arbitration Agreement would not be construed by a reasonable employee to interfere with his/her right to file charges or to access the Board's processes because the Charging Party filed a charge in this case is unpersuasive. As discussed above, in determining whether a work rule violates Section 8(a)(1), the Board considers whether maintaining a work rule, like the mandatory Arbitration Agreement, would have the objective tendency to interfere with, coerce or restrain employees in the exercise of the their Section 7 rights, not whether the rule has actually done so. The Charging Party's subjective experience is not at issue. Thus, that the Charging Party or his counsel actually filed Board charges or participated in Board processes is immaterial.

B. The 8(a)(1) *Allegation Regarding Enforcement of the Arbitration Agreement*

It is axiomatic that the enforcement of an unlawful work rule is itself unlawful. See *Murphy Oil*, slip op at 19–20. In *Murphy Oil* and subsequent cases, the Board has held that an employer's attempts to enforce unlawful provisions of a mandatory arbitration agreement is unlawful, and may be enjoined by the Board. Based on my finding that the Respondent's maintenance of the arbitration policy set forth in the Arbitration Agreement that requires employees to waive their rights to file class or collective claims in all forums violates the Act, I further find that enforcement of the policy is also unlawful. Therefore, I find that the Respondent's attempts to enforce it by filing a counterclaim, a motion for summary judgment, and other responsive papers to be unlawful, pursuant to *Murphy Oil*.

The Respondent argues that it did not violate the Act by its filings in District Court, even though they sought to preclude Phillips from pursuing claims on a class or collective basis, because it is protected by the Petition Clause of the First Amendment to the U.S. Constitution. Relying on the Supreme Court's ruling in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 746 (1983), the Respondent argues that the Board may not enjoin the Respondent's right to petition the government in the form of filing its motions and responses in district court, unless the Board demonstrates that the lawsuit is objectively baseless and subjectively brought with an unlawful motive. Id. It argues that its actions were not objectively baseless or pursued with an improper motive. Due to the disagreement among the various courts regarding the viability of the Board's theory in *Murphy Oil*, the Respondent's attempts to enforce the Arbitration Agreement through filings in District Court and with the AAA were based on a cognizable legal theory that does not lack a reasonable basis in fact or law within the meaning of *Bill Johnson's*. The General Counsel's theory of the violation in this case, however, does not rest on the general holding in *Bill Johnson's*, but on the Court's exception to its holding at Footnote 5 of that decision, which instructs that the Board does not impermissibly encroach on a Respondent's right to petition when it enjoins a lawsuit that has "an illegal objective under federal law." 461 U.S. at 737, fn. 5; *Murphy Oil*, slip op at 20–21. The Respondent's arguments that its litigation efforts were reasonably based or that it did not act with an unlawful motive misses the point.

The Board finds a lawsuit to have an "illegal objective" within the meaning of Footnote 5 of *Bill Johnson's* if it is aimed at achieving a result that is incompatible with the Act, when it seeks to enforce an agreement that is itself restricts Section 7 rights. *Murphy Oil*, slip op at 19–20. The Board, with court approval, interprets pleadings or motions taken in a lawsuit to have an illegal objective when aimed at a result incompatible with the Act. *Murphy Oil*, slip op at 19–20,

and cases cited therein. Here, like the respondent's efforts in *Murphy Oil*, the Respondent's attempts to enforce the Arbitration Agreement in court had the express and admitted purpose of attempting to preclude Philips from pursing his FLSA claim on a class basis in any forum. As discussed above, the Respondent violates the Act by precluding an employee from engaging in the protected, concerted right to pursue such a claim. Thus, because the preclusion of class or collective claims as set forth in the Arbitration Agreement is itself unlawful, the attempts to enforce it are also unlawful. The Respondent's use of the court and arbitration processes interferes with, coerces, and restrains Phillips' protected, concerted legal pursuits. In this sense, the "illegal objective" considered in footnote 5 is distinct from an "unlawful motive," in that the motive for bringing the suit is not at issue; rather, the illegal objective is inherent in the action taken itself and the outcome sought if the action is meritorious. *Murphy Oil*, slip op at 19, and cases cited therein. Therefore, I find that the Respondent has violated Section 8(a)(1) by its attempts to enforce the Arbitration Agreement in order to preclude Phillips from pursuit of his FLSA claim on a class or collective basis.

CONCLUSIONS OF LAW

1. The Respondent, Pizza the Pie, LLC and Becca Boo Pies, LLC, a single employer, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Since at least December 28, 2015, the Respondent has maintained an arbitration policy set forth in mandatory arbitration agreements that prohibits employees from pursuing multiplaintiff, class, and collective claims about terms and conditions of employment in all forums, arbitral and judicial, in violation of Section 8(a)(1) of the Act.

3. Since at least December 28, 2015, the Respondent has maintained an arbitration policy set forth in mandatory arbitration agreements that interferes with employees' rights to file charges with the Board and to access the Board's processes, in violation of Section 8(a)(1) of the Act.

4. Since at least June 24, 2016, the Respondent has enforced its arbitration policy through provisions of a mandatory arbitration agreement that prohibits employees from pursuing multiplaintiff, class, and collective claims about terms and conditions of employment in all forums, by filing pleadings, motions, and responses in court and arbitration aimed to compel arbitration of Phillips' FLSA claim on an individual basis only, in violation of Section 8(a)(1) of the Act.

5. The above violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent engaged in unfair labor practices, I shall order it to cease and desist from such conduct and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall be required to revise or rescind the unlawful arbitration policy set forth in the Arbitration Agreement to make clear to employees that the Arbitration Agreement does not constitute a waiver of their rights to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' rights to file charges with the Board or to access the Board's processes. The Respondent shall notify all current employees, former employees, and job applicants who were subject to the arbitration policy or who were required to sign or were bound by the Arbitration Agreement since December 28, 2015, that the Arbitration Agreement has been rescinded or revised, and if revised, provide them a copy of the revised policy or agreement.

Consistent with the Board's usual practice in cases involving unlawful litigation, the Respondent shall be required to reimburse Phillips for any reasonable attorneys' fees and litigation expenses, with interest, to date and in the future, directly related to opposing Respondent's filings in court and/or arbitration that attempt to compel arbitration of Phillips' individual claims and/or to dismiss the class claims. See *Murphy Oil*, above, slip op at 21. Determining the applicable rate of interest on the reimbursement will be as outlined in *New Horizons*, 283 NLRB 1173 (1987). Interest on all amounts due to Phillips shall be computed on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The Respondent shall also be required to notify the United States District Court for the Northern District of Georgia and the American Arbitration Association that it has rescinded or revised the Arbitration Agreement upon which it based its counter claim, motion for summary judgment, and other responsive papers aimed to compel arbitration of the Henry Thomas Phillips, III's FLSA collective claim on an individual basis or to dismiss the collective claims, and inform the court and arbitral body that it no longer opposes Phillips' FLSA action on that basis. The General Counsel seeks a broader requirement that the Respondent notify all judicial and arbitral bodies before which Respondent may have moved to compel enforcement of the Arbitration Agreement in any action; however the Board's practice appears to narrowly tailor this judicial notification requirement to cover only the underlying legal actions brought by a charging party, and I shall so limit my recommended Order.

The Respondent shall post a notice in all locations where the Arbitration Agreement was in effect. See, e.g., *U-Haul of California*, above, fn. 2; *D. R. Horton*, above at 2289; *Murphy Oil*, above, slip op at 22; Phillips worked in multiple sites, only some of which are identified in the record and, the record does not establish in which sites, if any, he did not work. On this record, I find it appropriate to require the Respondent to post the full notice at all locations. The Respondent is also ordered to distribute appropriate remedial notices to its employees, former employees, and applicants electronically, such as by email, posting on an intranet or internet site, and/or other appropriate electronic means, if it customarily communicates with its employees, former employees, and/or applicants by such means. *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [12]

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Pizza the Pie, LLC and Becca Boo Pies, LLC, a single employer, Winder, Georgia, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an arbitration policy and/or an arbitration agreement that requires employees, as a condition of employment, to waive their rights to pursue employment-related class or collective claims in all forums, arbitral or judicial, and/or that employees would reasonably conclude would prohibit or restrict their rights to file unfair labor practice charges with the National Labor Relations Board or to access the Board's processes.

(b) Enforcing an arbitration agreement that requires employees to waive their rights to pursue employment-related class or collective claims in all forums by seeking to compel arbitration on an individual basis.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise its arbitration policy set forth in the Arbitration Agreement in all of its forms, to make it clear to employees that the policy and the Arbitration Agreement do not constitute a waiver of their rights to pursue employment-related joint, class, or collective actions in all forums, and to make it clear to employees that the policy and Arbitration Agreement do not restrict their rights to file charges with the Board or to access the Board's processes.

(b) Notify all employees, former employees, and applicants who were subject to the arbitration policy, or who signed or were bound by the Arbitration Agreement in any form since December 28, 2015, at all locations where the policy has been in effect, that the Arbitration Agreement has been rescinded or revised, and if revised, provide them with a copy of the revised policy or agreement.

(c) Notify the United States District Court for the Northern District of Georgia and the American Arbitration Association that it has rescinded or revised the Arbitration Agreement upon which it based its counterclaim, Motion for Summary Judgment, and other responsive papers aimed to compel arbitration on an individual basis or to dismiss in Henry Thomas Phillips, III's FLSA collective claim, and inform the court and arbitral body that it no longer opposes Phillips' FLSA action on that basis.

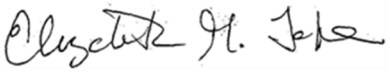
(d) Reimburse Phillips and other employees who joined Civil Case No. 2:16-CV-75-WCO and Case No. 01–16–0002–5788, if any, for any litigation expenses: (i) directly related to opposing the Respondent's counterclaim, Motion for Summary Judgment, or other responsive papers aimed to compel arbitration on an individual basis only or to dismiss Phillips' collective

claim; and/or (ii) resulting from any other legal action taken by them in response to Respondent's efforts to enforce the Arbitration Agreement.

(e) Within 14 days after service by the Region, post at all facilities where the arbitration policy or Arbitration Agreement is maintained or enforced, copies of the attached notice marked "Appendix"[13] in any languages deemed appropriate by the Regional Director for Region 10. Copies of the notice, on forms provided by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees, former employees, or applicants by such means. Respondent also shall duplicate and mail, at their own expenses, a copy of the notice to all former employees and applicants who were required to sign the Arbitration Agreement or were bound by the policy during their employment with the Respondent. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees, former employees, and applicants either employed by the Respondent or bound by the Arbitration Agreement at any time since December 28, 2015.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated at Washington, D.C., March 3, 2017.



Elizabeth Tafe
Administrative Law Judge

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce an arbitration policy or arbitration agreement that requires employees to waive the right to maintain employment-related class or collective action in all forums, whether arbitral or judicial.

WE WILL NOT maintain an arbitration policy or arbitration agreement that you would reasonably understand to prohibit or restrict your rights to file charges with the Board or to access to the Board's processes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our "Mutual Agreement to Arbitrate" (Arbitration Agreement) in all its forms, or revise it in all of its forms, to make clear that the Arbitration Agreement does not constitute a waiver of your rights to maintain employment-related joint, class, or collective action in all forums and to make clear that you understand that it does not prohibit or restrict your rights to file charges with the Board or to access the Board's processes.

WE WILL notify all current employees, former employees, and job applicants who were required to sign or otherwise become bound to the Arbitration Agreement in all its forms that the arbitration agreement has been rescinded or revised and, if revised, **WE WILL** provide them a copy of the revised policy.

WE WILL notify the court in which Henry Thomas Phillips, III, filed his class action lawsuit and the arbitration body in which he filed for arbitration on a collective basis that we have rescinded or revised the Arbitration Agreement upon which we based our efforts to compel arbitration of Phillips' individual claims and dismiss the class claims, and **WE WILL** inform the court and arbitration body that we no longer oppose Phillips' class action lawsuit on the basis of that arbitration agreement.

WE WILL reimburse Henry Thomas Phillips, III, and any employees who joined his collective claims, for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing our attempts to compel arbitration of his individual claims and/or to dismiss the class claims.

PIZZA THE PIE, LLC AND BECCA BOO PIES, LLC, a Single Employer.
(Employer)

Dated:_____By_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
Harris Tower, 233 Peachtree Street N.E., Suite 1000, Atlanta, GA 30303-1531
(404) 331-2896, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-179060 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (404) 331-2890.